LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.
FILED
JAN 12 1968
JOHN F. DAVIS, CLERK

No. 1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

KNOWLES ELECTRONICS, INC. and HUGH S. KNOWLES,
Petitioners,

v.

TIBBETTS INDUSTRIES, INC. and GEORGE C. TIBBETTS,
Respondents.

PETITION FOR A WRIT OF CERTICRARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILFRED S. STONE,
ANTHONY S. ZUMMER
STONE, ZUMMER & LIVINGSTON
134 South LaSalle Street
Chicago, Illinois 60602,
Attorney for Petitioners

McCORMICK & HENDERSON, INC., CHICAGO

SUBJECT INDEX

PAGE

Opinions of the courts and administrative tribunals below [Rule 23 1.(a)] 2

Jurisdiction and grounds for granting the writ [Rule 23 1.(b)] 3

The question presented for review [Rule 23 1.(c)] 4

Relevant statutes and congressional records [Rule 23 1.(d)] 4

The patent act of 1952—35 U.S.C. 5

The Amendment of 1927 6

The Law prior to the 1927 Amendment 7

Judiciary Act of 1948 7

Senate Report No. 1313, 69th Congress, 2d Session 8

Statement of the Case [Rule 23 1.(e)] 10

Argument [Rule 23 1.(h)] 13

Ground 1 for granting the writ 13

Ground 2 for granting the writ 16

Conclusion 20

Table of cases cited iii

Table of Reports of Congress iii

Table of Statutes Cited iii

PAGE

Appendix:

Decision of Board of Patent Interferences ..... App. 1

Opinion of Court of Customs and Patent Appeals ..... App. 11

Denial of Petition for Writ of Certiorari ..... App. 22

Finding of Board of Patent Interferences on remand ..... App. 23

Denial of Motion to Confirm Jurisdiction ..... App. 28

Opinion of District Court ..... App. 32

Opinion of Court of Appeals ..... App. 37

Senate Report No. 1313, 69th Congress, 2d Session ..... App. 45

House Report No. 1889, 69th Congress, 2d Session ..... App. 51

Bates Mfg. Co. v. United States, 303 U.S. 567 ..... App. 62

Chase et al. v. Coe, Com'r Pats., 122 F.2d 128, 49 USPQ 590 ..... App. 67

Taylor et al. v. Marzall, Com'r Pats., 196 F.2d 592, 93 USPQ 127 ..... App. 72

Table of Cases Cited

PAGE

Bates Mfg. Co. v. United States, 303 U.S. 468 (1937) 3, 16, 17

Chase v. Coe, 122 F.2d 128, 49 USPQ 590, CADC (1941) 3, 4, 13, 15, 16

Hilbert L. Bair, 62-1 USTC Par. 9390 18

Knowles v. Tibbetts (CCPA) 347 F.2d 591, 146 USPQ 59 ..... 2, App. 11, App. 39

Taylor et al. v. Marzall, 196 F.2d 592, 93 USPQ 127, CADC (1952) 3, 13

Tecon Engineers, Inc., 65-1 USTC Par. 9320 E. D. Ky. 17

Tecon Engineers, Inc., 65-1 USTC Par. 9373, 343 F.2d 943 (Ct. Cls.) 18

Tibbetts Industries, Inc. et al. v. Knowles Electronics, Inc. et al., 263 F. Supp. 275, 152 USPQ 298 2

Table of Reports of Congress

Senate Report No. 1313, 69th Congress, 2d Session....15, 19

House Report No. 1889, 69th Congress, 2d Session....15, 19

Table of Statutes Cited

R. S. 4911 (Prior 1927) 7

R. S. 4915 (Prior 1927) 7

R. S. 4911 (1927) 6, 15, 16

R. S. 4912 (1927) 6

PAGE

R. S. 4915 (1927) 6, 14, 15

28 U. S. C. 1542 7

35 U. S. C. § 63 (Prior 1952) 7

35 U. S. C. § 141 ..... 3, 4, 5, 10, 12, 13, 18, 19

35 U. S. C. 145 7

35 U. S. C. § 146 ..... 3, 4, 5, 11, 12, 13, 14, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

KNOWLES ELECTRONICS, INC. and HUGH S. KNOWLES,
Petitioners,

v.

TIBBETTS INDUSTRIES, INC. and GEORGE C. TIBBETTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: *The Honorable Chief Justice*
And Associate Justices of the
Supreme Court of the United States:

Your petitioners, Knowles Electronics, Inc. and Hugh S. Knowles, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered on November 29, 1967.

Rule 23 1.(a)

OPINIONS OF THE COURTS AND ADMINISTRATIVE TRIBUNALS BELOW

1. Decision of the Board of Patent Interferences in the United States Patent Office dated May 31, 1963. App. page 1.
2. Decision of the Court of Customs and Patent Appeals dated June 24, 1965, reported at 347 F.2d 591, 52 CCPA, 1800, 820 O.G. 863, 146 USPQ 59. App. page 11.
3. Denial of Petition for Writ of Certiorari in No. 905, October Term, 1965, by the United States Supreme Court dated February 28, 1966, reported at 383 U.S. 927. App. page 22.
4. Finding and order of the Board of Patent Interferences in the United States Patent Office on remand from the Court of Customs and Patent Appeals dated May 3, 1966. App. page 23.
5. Decision of Court of Customs and Patent Appeals denying motion to confirm jurisdiction dated June 30, 1966. App. page 28.
6. Opinion of District Court filed December 22, 1966, reported at 263 F.Supp. 275, 152 USPQ 298. App. page 32.
7. Opinion of the United States Court of Appeals for the Seventh Circuit dated November 29, 1967. App. page 37.

Rule 23 1.(b)

JURISDICTION AND GROUNDS FOR GRANTING THE WRIT

(i) The opinion sought to be reviewed is dated November 29, 1967.

(ii) A petition to stay the mandate through January 16, 1968 was granted by the Court of Appeals for the Seventh Circuit.

(ii) The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

The grounds under Rule 19 of this court for granting this writ are two.

First Ground:

The Court of Appeals for the Seventh Circuit has rendered a decision under 35 U.S.C. §§ 141 and 146 in conflict with two decisions of the Court of Appeals for the District of Columbia Circuit, namely: *Chase* v. *Coe,* 122 F.2d 128, 49 USPQ 590, CA DC (1941), Appendix, this brief, page 67; and *Taylor et al.* v. *Marzall,* 196 F.2d 592, 93 USPQ 127, CA DC (1952), Appendix, this brief, page 72.

Second Ground:

The Court of Appeals for the Seventh Circuit has decided a federal question in a way in conflict with an applicable decision of this court relating to equal and concurrent jurisdiction of various federal courts, specifically of federal district courts and the Court of Claims, namely: *Bates Mfg. Co.* v. *United States,* 303 U.S. 468 (1937), Appendix, this brief, page 62.

Rule 23 1.(c)

THE QUESTIONS PRESENTED FOR REVIEW

Where a litigant has elected by 35 U.S.C. §146, or has permitted by 35 U.S.C. §141, an interference to proceed to the Court of Customs and Patent Appeals, can he have any issue in that interference disposed of by any court at any time other than the Court of Customs and Patent Appeals (excepting the United States Supreme Court)?

Rule 23 1.(d)

RELEVANT STATUTES AND CONGRESSIONAL RECORDS

The pertinent statutes are 35 U.S.C. §141 and §146. These are placed in two columns in order that they may be compared to their respective predecessor sections which are those upon which the Court of Appeals for the District of Columbia acted in *Chase* v. *Coe* back in 1941, which petitioners submit is contrary to the decision below.

The word "decision" is placed in italics as are the words "all further proceedings" because this petition for review is based on the contention that "all further proceedings" limits the right to elect a tribunal under these two sections to the *first* "decision" of the Patent Office.

THE PATENT ACT OF 1952—35 U.S.C.

"§141, Appeal to Court of Customs and Patent Appeals

* * *

A party to an interference dissatisfied with the *decision* of the board of patent interferences on the question of priority may appeal to the United States Court of Customs and Patent Appeals, but such appeal shall be dismissed if any adverse party to such interference, within twenty days after the appellant has filed notice of appeal according to section 142 of this title, files notice with the Commissioner that he elects to have *all further proceedings* conducted as provided in section 146 of this title. * * *"

"146. Civil action in case of interference

Any party to an interference dissatisfied with the *decision* of the board of patent interferences on the question of priority, may have remedy by civil action, if commenced within such time after such *decision*, not less than sixty days, as the Commissioner appoints or as provided in section 141 of this title, unless he has appealed to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided. * * *"

THE AMENDMENT OF 1927

Either party could appeal from the Patent Office decision to the Court of Appeals of the District Court of Columbia or he could file an equity suit in a federal court, but neither could do both.

35 U.S.C. §59a

"Sec. 4911. * * If any party to an interference is dissatisfied with the *decision* of the board of appeals, he may appeal to the Court of Appeals of the District of Columbia, p r o v i d e d that such appeal shall be dismissed if any adverse party to such interference shall, within twenty days after the appellant shall have filed notice of appeal according to section 4912 of the Revised Statutes, file notice with the Commissioner of Patents that he elects to have *all further proceedings* conducted as provided in section 4915 of the Revised Statutes."

35 U.S.C. §63

"Sec. 4915. Whenever a patent on application is refused by the Commissioner of Patents, the applicant, unless appeal has been taken from the *decision* of the board of appeals to the Court of Appeals of the District of Columbia, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, * * *"

THE LAW PRIOR TO THE 1927 AMENDMENT

35 U.S.C. §59a.

"Sec. 4911. If such party, except a party to an interference, is dissatisfied with the *decision* of the commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc. (See sec. 9, act of February 9, 1893, post, p. 23.)"

35 U.S.C. §63

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity; * * *"

JUDICIARY ACT OF 1948

The jurisdiction of the Court of Customs and Patent Appeals as to patents was established.

"1542, Patent Office decisions

The Court of Customs and Patent Appeals shall have jurisdiction of appeals from decisions of:

(1) the Board of Appeals and the Board of Interference Examiners of the Patent Office as to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and such appeal by an applicant shall waive his right to proceed under section 63 of Title 35; * * *"

The reference to Section 63 of Title 35 remains in the act as of today, although that section was repealed in 1952 and replaced by 35 U.S.C. §§145 and 146. These two sections should be read in place of Section 63 as it presently appears in 28 U.S.C. §1542.

Calendar No. 1341

69TH CONGRESS, 2d Session | SENATE | REPORT No. 1313

PROCEDURE IN PATENT OFFICE

JANUARY 24, 1927.—Ordered to be printed

MR. SHIPSTEAD, from the Committee on Patents, submitted the following

REPORT

[To accompany S. 4812]

The Committee on Patents, to whom was referred the bill (S. 4812) amending the statutes of the United States as to procedure in the Patent Office and in the courts with regard to the granting of letters patent for inventions and with regard to interfering patents, having considered the same, report favorably thereon with the recommendation that the bill do pass with amendments.

The bill has the approval of the Department of Commerce, as will appear by the following letter, which is made a part of this report:

DEPARTMENT OF COMMERCE,
OFFICE OF THE CHIEF CLERK,
Washington, December 20, 1926

HON. JESSE H. METCALF,
Chairman Senate Committee on Patents,
United States Senate.

MY DEAR SENATOR: As requested by you, careful consideration has been given to the bill (S. 4812) for amending the statutes as to procedure in the Patent Office and in the courts with regard to the granting of patents.

A report of Commissioner Robertson is appended hereto, aproving the bill.

This bill also meets the approval of the department, and I join in urging its passage at the present session.

Yours faithfully,

HERBERT HOOVER,
Secretary of Commerce.

DEPARTMENT OF COMMERCE,
UNITED STATES PATENT OFFICE,
Washington.

(Memorandum for Secretary Hoover.)

Careful consideration has been given to Senate bill 4812.

For a quarter of a century efforts have been made to simplify the procedure within the Patent Office with respect to appealed cases. The bill

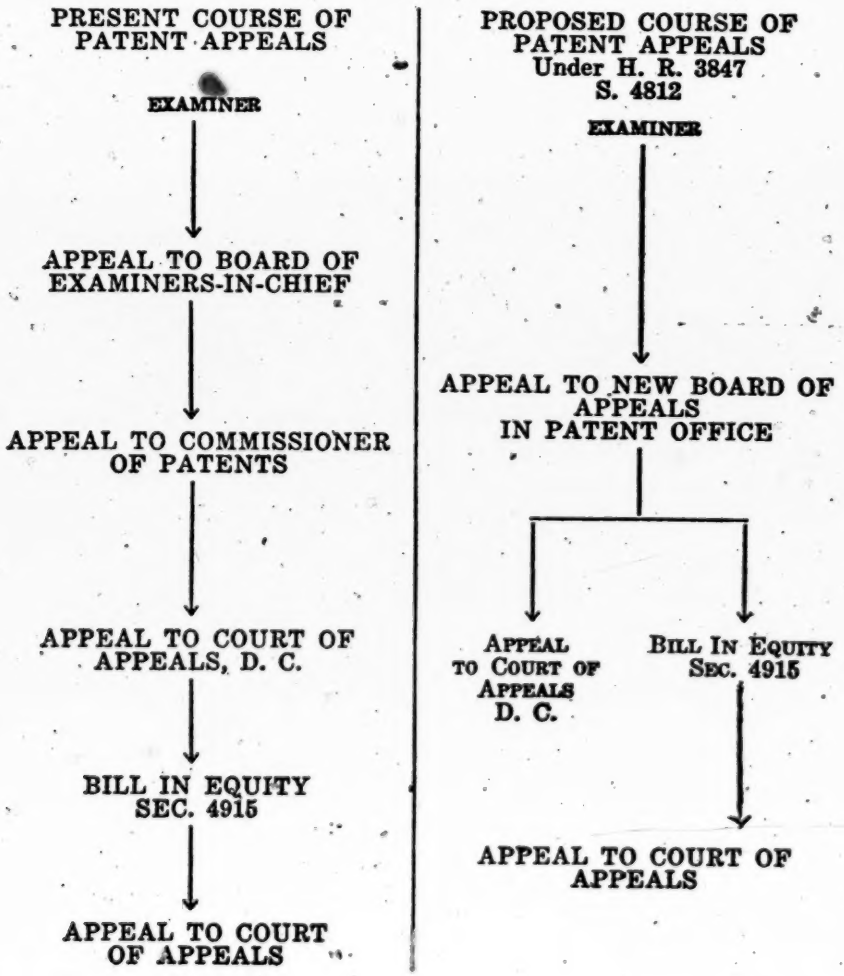
under consideration makes this possible. It received practically the unanimous indorsement of the patent and trade-mark section of the American Bar Association at the Denver meeting and has also been favorably acted upon by the Patent Law Associations of New York and Chicago.

The bill also relates to appeals from the Patent Office and instead of permitting a losing party in the Patent Office to appeal to the Court of Appeals of the District of Columbia and then start de novo in a United States district court under section 4915 of the Revised Statutes and to finally appeal therefrom, the bill provides that the applicant may appeal to the Court of Appeals, or may file his bill in equity, but that he can not do both. I am inclosing a chart showing on one side the present course of appeals and on the other side the proposed course of appeals.

I regard the bill as a great step forward in patent procedure and hope it will be pushed to passage at this session of Congress.

THOMAS E. ROBERTSON, *Commissioner.*

DECEMBER 18, 1926.


PRESENT COURSE OF PATENT APPEALS
EXAMINER
APPEAL TO BOARD OF EXAMINERS-IN-CHIEF
APPEAL TO COMMISSIONER OF PATENTS
APPEAL TO COURT OF APPEALS, D. C.
BILL IN EQUITY SEC. 4915
APPEAL TO COURT OF APPEALS
PROPOSED COURSE OF PATENT APPEALS Under H. R. 3847 S. 4812
EXAMINER
APPEAL TO NEW BOARD OF APPEALS IN PATENT OFFICE
APPEAL TO COURT OF APPEALS D. C.
BILL IN EQUITY SEC. 4915
APPEAL TO COURT OF APPEALS

Rule 23 1.(e)

STATEMENT OF THE CASE

In interference No. 91,812* in the Patent Office, petitioners claimed completion of the invention in 1953, and most of petitioners' evidence and exhibits (the printed record contains 498 pages) sought to show that petitioners had not abandoned their invention from 1953 to their filing date in 1958. The Patent Office found that petitioners had not completed the invention in 1953 nor at any time before their filing date in 1957, said nothing about petitioners' abandoning the invention, and found that respondents had not completed the invention before their filing date in 1957. Since respondents were the senior parties, the decision awarded priority to them.

Both parties appealed to the Court of Customs and Patent Appeals under 35 U.S.C. §141. Petitioners in paragraphs 1, 2, 3 and 7 of their Appeal, presented as grounds

---

* An interference is litigation in the United States Patent Office between two or more applicants for a patent on the same invention. There are no pleadings as such, but otherwise the proceedings are very similar to an ordinary lawsuit, with the exception that all testimony is taken by deposition. There is only one issue in an interference, namely, priority of invention, but there are sub-issues which each party must meet, namely, the conception date, actual reduction to practice and proof of no abandonment, suppression or concealment after that reduction to practice. An invention consists of conception and reduction to practice. If a party fails on the first two, he receives his filing date as the date when he completed the invention. The party first to file is the senior party, and the party second to file is the junior party and the burden of going forward is upon the junior party.

of appeal the failure to find reductions to practice in the years 1953, '54, '55, '56 and '57. If the Court of Customs and Patent Appeals found a reduction to practice in, say, 1953, then the subsequent work would negative abandonment. Respondents' Appeal took no exception to the failure of the Patent Office to make a fact finding that petitioners had abandoned, suppressed or concealed the invention at any time.

The Court of Customs and Patent Appeals reversed, finding that petitioners completed the invention in both 1953 and 1955, both prior to respondents' alleged conception date, but remanded to the Patent Office to make a specific finding on the issue of abandonment, suppression or concealment of the invention by petitioners, the case to be disposed of in accordance with this finding.

The Patent Office disposed of the case in accordance with the mandate, saying:

> "* * * the matter to be considered was briefed and argued prior to our decision in the first instance * * *"

It found no abandonment, suppression or concealment by petitioners, and in accordance with the mandate awarded the patent to petitioners. The interference stood undissolved.

The respondents did not appeal to the Court of Customs and Patent Appeals. Instead, treating the finding of fact and disposition in accordance with the mandate as a second decision, respondents instituted a suit in the Northern District of Illinois, Eastern Division (residence of both petitioners), praying in Count I that a patent be issued to them. Jurisdiction was based on 35 U.S.C. §146, the theory being that the action of the Patent Office gave them the right to change appellate tribunals.

Petitioners asked the Court of Customs and Patent Appeals to confirm its sole jurisdiction. This motion was

denied on the date it was filed,—there appearing on the first page these words: "This motion is denied 30 June '66 Giles S. Rich, Judge." Petition set forth in App. page 28.

Thereupon, petitioners moved to dismiss Count I (Count II is not at issue here) on the ground that once respondents (1) by inaction under Section 141 permit the proceeding to go to the Court of Customs and Patent Appeals, or (2) a fortiori, by themselves appealing the case under Section 141 to the Court of Customs and Patent Appeals,—they lost their rights to institute an action in a federal district court subsequently under Section 146 where the controversy is a single proceeding. *The interference, numbered 91,812 is still in existence in the Patent Office.*

The district court, reading Section 146 of 35 U.S.C. literally, said that the action of the Patent Office in accordance with the mandate was a decision of equal status with the earlier decision, and dismissed the motion. Congress' intention to set up two courts of equal and concurrent jurisdiction to either of which either party could elect to go,—once,—was ignored. The words "all further proceedings" in Section 141 were explained.

The Court of Appeals for the Seventh Circuit affirmed, on the same literal interpretation presented by the trial court. The Court of Appeals also seemed to imply that the Court of Customs and Patent Appeals had decided adversely to the petitioners, saying:

> "Following the filing of this complaint, on June 29, 1966 Knowles filed an emergency motion in the CCPA asking that court to confirm its sole jurisdiction in this matter. This motion was summarily denied by Judge Rich on June 30, 1966, through his handwritten notation on the original petition. In short, this appears to have been an abortive attempt by Knowles to force this review before the CCPA."

Rule 23 1.(h)

ARGUMENT

Ground 1 for granting the writ:

> The Court of Appeals for the Seventh Circuit has rendered a decision under 35 U.S.C. §§ 141 and 146 in conflict with two decisions of the Court of Appeals for the District of Columbia Circuit, namely: *Chase* v. *Coe*, 122 F.2d 128, 49 USPQ 590, CA DC (1941), Appendix, this brief, page 67; and *Taylor et al.* v. *Marzall*, 196 F.2d 592, Appendix, this brief, page 72.

Petitioners will first compare the facts in the two cases and will then show that if the Court of Appeals for the District of Columbia Circuit had been deciding this case, it would have held that this case was *a fortiori* its decision in *Chase* v. *Coe* because the same interference existed when the Patent Office made its second decision, and it exists now. That court held that the "same proceedings" included "ex parte" activity after the termination of the interference.

The facts of the two cases compare as follows:

Chase v. *Coe* 122 F.2d 198, 49 USPQ 590 (1941)	*Tibbetts* v. *Knowles* U.S. Court of Appeals for The Seventh Circuit No. 16090
1. In the Patent Office, Chase won an interference against Avery.	1. In the Patent Office Tibbetts won an interference against Knowles.
2. Avery appealed to the Court of Customs and Patent Appeals under 35 U.S.C. §4911 (predecessor to §141).	2. Knowles appealed to the Court of Customs and Patent Appeals under 35 U.S.C. §141.

3. Chase did not exercise his right to force Avery to bring a civil action in a court.	3. Tibbetts *not only* did not exercise his right to force Knowles to bring a civil action in a court, but also appealed.
4. The Court of Customs and Patent Appeals reversed, awarding the patent to Avery. This terminated the interference.	4. The Court of Customs and Patent Appeals reversed, awarding priority to Knowles, subject nevertheless to the Patent Office making a finding with regard to abandonment by Knowles. The case was remanded for this one purpose.
	5. A petition for certiorari to this court was filed by Tibbetts and was denied.
6. The Patent Office issued the patent to Avery on his application. Chase, back in the Patent Office, submitted new claims in his application which he felt distinguished from the subject matter of the interference. The Patent Office rejected these.	6. The Patent Office found no abondonment, concealment or suppression by Knowles, and awarded the patent to Knowles under the mandate.
7. Chase brought a civil action in the District Court of the District of Columbia under 4915 (now §146) seeking an order directing the Commissioner to issue a patent on these claims to Chase.	7. Tibbetts brought a civil action in the District Court for the Illinois, Eastern Division under 35 U.S.C. §146 seeking authorization to the Commissioner to issue a patent to Tibbetts.

8. On a motion to dismiss for lack of jurisdiction by the district court, the motion was *granted.*	8. On a motion to dismiss for lack of jurisdiction by the district court, the motion was *denied.*
9. This decision denying jurisdiction was affirmed by the Court of Appeals for the District of Columbia on the ground that having once submitted to an appeal to the Court of Customs and Patent Appeals, a district court has no jurisdiction to consider any fact or issue of law raised or that could have been raised by either party on that appeal. The Court of Appeals for the District of Columbia, considered the Senate and House bills, this brief, page 8, and App. pages 45 to 61, and found that literal interpretation of Sec. 4911 (now Sec. 141) and 4915 (now Sec. 146) violated the intent of Congress.	9. This decision sustaining jurisdiction was affirmed by the Court of Appeals for the Seventh Circuit on the ground that the Patent Office had made two decisions, and that Tibbetts' action after the first did not impair his right to proceed under Sec. 146 under the second. The statute was literally interpreted and the intention of Congress in Senate Report 1313, App. page 45, and House Report 1889, App. page 51, was ignored.

The difference between the two cases is that in *Chase* v. *Coe,* the interference terminated with the mandate of the Court of Customs and Patent Appeals. There was no longer any relationship between the parties in the Patent Office. Chase received a rejection of his case. It was a decision, a second decision with respect to him. His civil action on the decision was dismissed for lack of jurisdiction. What he was trying to do was held to be part of the earlier proceedings even though there was no file relationship to those proceedings.

A fortiori, the present case; where the interference continues to exist. Petitioner's interpretation of "all further proceedings" as referring to a specific interference, in this case # 91,812, was assumed to be the law in 1937, even by Avery. Note the language in *Chase* v. *Coe*:

> "But appellant says that the phrase 'all further proceedings" in R. S. 4911 refers only to further proceedings in interference and not to subsequent ex-parte prosecutions of the application of either party to the interference."

The present controversy is still in the same interference, the files in the Patent Office bearing number 91,812.

Petitioners submit that in holding that respondents can make two elections between courts of equal and concurrent jurisdiction in the same interference proceeding in the Patent Office, the Court of Appeals has decided a jurisdictional question in a manner in conflict with a decision of the Court of Appeals for the District of Columbia.

Ground 2 for granting the writ:

> The Court of Appeals for the Seventh Circuit has decided a federal question in a way in conflict with an applicable decision of this court relating to equal and concurrent jurisdiction of federal courts and the Court of Claims, namely, with *Bates Mfg. Co.* v. *United States,* 303 U.S. 468 (1937), Appendix, this brief, page 62.

This court has decided a question as to equal and concurrent jurisdiction of the federal district courts and the Court of Claims in a way which is in conflict with the decision of the Court of Appeals for the Seventh Circuit with respect to the concurrent jurisdiction of the federal district

courts and the Court of Customs and Patent Appeals. The factual and legal disposition of the *Bates* case is surprisingly close to the situation here at issue.

In *Bates,* the Revenue Act of 1926 was quoted as denying the right to maintain a suit in any court for the recovery of any Internal Revenue tax unless the suit was "begun" within two years after the disallowance of a claim for that tax. The Tucker Act of 1887 gave concurrent jurisdiction for claims not exceeding a selected sum of money to the district courts, but this act set forth requirements as to how a suit in a district court should be instituted, requiring not only the filing but the serving of the Attorney General.

Bates filed a claim one day before the expiration of the two-year period in a district court, but he did not serve the Attorney General until four days later, which occurred more than two years after the refund was disallowed. The parties conceded that if he had filed in the Court of Claims, he would be on time because it had been held that *filing* in the Court of Claims met the word "begun."

The district court held that the literal interpretation of the Tucker Act did require notification of the Attorney General, and hence the complaint was filed late. The Court of Appeals affirmed.

This court reversed, saying that it was the intention of Congress to give equal and concurrent jurisdiction to the two courts up to a certain amount and that this meant that the Statute of Limitations was to be the same for both courts.

The lower courts have carried out this court's views by stating that once an election has been made as to one of two courts, a party cannot change his mind. There can be only one election. In *Tecon Engineers, Inc.,* 65-1 USTC

Par. 9320 E. D. Ky., a district court dismissed a case already disposed of by the Court of Claims, and in *Hilbert L. Bair* 62-1 USTC Par. 9390, the Court of Claims dismissed an action already decided by the Tax Court. In *Tecon Engineers, Inc.* 65-1 USTC Par. 9373, 343 F2d 943 (Ct. Cls.) cert. denied 382 U.S. 976 (1965), the court stated that:

> "Plaintiffs concede that they must elect between suit in the Court of Claims and suit in another court of concurrent jurisdiction. . . ."

Petitioners submit that this court has indicated that the whole concept of concurrent jurisdiction between various courts, particularly in the case of district courts and the Court of Claims in tax suits, is to give that party seeking relief alternative but equal forums; that these forums are alternative only insofar as the initiating of the action; and that once such action is initiated the jurisdiction of the court in which the action is brought becomes exclusive.

Since it is clear that if a district court is selected under 35 USC Sec. 141, all further proceedings must be carried on under its jurisdiction,—even though the district court asks the Patent Office to do something further,—it would seem equally clear that if the Court of Customs and Patent Appeals is to be equal to the district courts in an interference proceeding, after it has been elected, all further proceedings must be conducted under its jurisdiction.

Petitioners note that this court in the *Bates* case did not hesitate to override a literal interpretation of the words of the Tucker Act,—an interpretation adopted by the district court and the court of appeals. If filing in the Court of Claims satisfied the statute of limitations, filing had the same effect in the district courts. This is the position of the petitioners here. The reasoning of the district court adopted by the Court of Appeals is:

"The statutory language does not preclude and slightly favors Tibbetts' right to sue here. No violence is done to Secs. 141 and 146 by reading the word 'decision' to refer to every independent adjudication made by the Board. Nothing in the statute requires a waiver following one decision to reach a second decision in the same interference. The statute speaks solely in terms of 'decisions,' not interferences or proceedings.[2] It can hardly be debated that the Board made two decisions in this case."

"[2] Under Sec. 141, an appeal in the CCPA goes forward unless a party 'elects to have all further proceedings conducted' in federal district court. However, the word 'proceedings' in Sec. 141 is clearly controlled by the prior word 'decision' in the section and is limited to proceedings on that decision."

The case is disposed entirely on the court's interpretation of words. No mention is made of Senate Report No. 1313, dated January 24, 1927, the first two pages of which are set forth above on pages 8 and 9, with the complete report in the Appendix on page 45, nor of the House Report No. 1889 dated January 28, 1927, Appendix, page 51.

Petitioners submit that the Court of Appeals below has decided a question relating to equal and concurrent jurisdiction of the federal courts contrary to an applicable decision of this court, and that the case was disposed of on a literal interpretation of words, whereas this court looks to the intent of Congress.

CONCLUSION

Petitioners submit that the Petition for Certiorari should be granted for two reasons: Firstly, because there is a conflict between the decision below and another court of appeals, and secondly, because the decision below is in conflict with an applicable decision of this court.

Respectfully submitted,

WILFRED S. STONE
ANTHONY S. ZUMMER
134 South La Salle Street
Chicago, Illinois 60603